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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1452

STATE OF OREGON,

Petitioner,

v.

WILLIAM ROBERT HASS,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of Oregon

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals of the State of Oregon reversing and remanding Hass's burglary conviction (Petition for Certiorari, at 20-25) is reported at 13 Or. App. 368, 510 P.2d 852 (1973). The opinion of the Supreme Court of the State of Oregon affirming the decision of the court of appeals (Petition for Certiorari, at 12-18) is reported at 267 Or. 489, 517 P.2d 671 (1973).

JURISDICTION

The decision of the Supreme Court of the State of Oregon was filed on December 31, 1973. Pursuant to Rule 22 (1), the petition for a writ of certiorari was filed within 90 days of that date, on March 29, 1974.

Certiorari was granted on October 15, 1974. The jurisdiction of this Court rests on 28 U.S.C. § 1257 (3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

> "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . ."

United States Constitution, Amendment XIV, Section 1:

> ". . . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

QUESTION PRESENTED

Notwithstanding this Court's decision in *Harris v. New York*, 401 U.S. 222 (1971), do the Fifth and Fourteenth Amendments prevent the prosecution from impeaching a criminal defendant's trial testimony with prior inconsistent statements made after the defendant has been advised of his *Miranda*[1] rights and has expressed a desire to talk to an attorney, but which are not otherwise claimed to be involuntary or untrustworthy?

STATEMENT OF THE CASE

A. General Background

Hass was convicted upon trial by jury of a burglary in the first degree (Oregon Revised Statutes 164.225),[2]

[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

[2] ORS 164.215. "(1) A person commits the crime of burglary in the second degree if he enters or remains unlawfully in a building with intent to commit a crime therein.

(Continued on next page)

which involved the stealing of a bicycle from the garage of a residence in Klamath Falls, Oregon. He appealed his conviction to the Oregon court of appeals, which decided three of the four issues raised adversely to Hass, but reversed the judgment on the ground that certain statements Hass made to a police officer were improperly used to impeach his trial testimony (Petition for Certiorari, at 20-25). Upon the State's petition for review, the Oregon supreme court affirmed the decision of the court of appeals (Petition for Certiorari, at 12-18).

B. Facts Material to the Question Presented

On the day of the burglary, officer Osterholme of the Oregon State Police talked to Hass about the theft of the bicycle taken therein, after advising him of his *Miranda* rights (Tr. 45-46, 50-51; A. 3-5, 9-10). Hass admitted that he had taken two bicycles that day, and was not sure, at first, which bicycle Osterholme was talking about (Tr. 52; A. 10). He stated that he had given one of the two bicycles back and agreed to show Osterholme where he had concealed the other (Tr. 53-54; A. 11-12).

At some point on the trip to the spot where the second bicycle was concealed, Hass, who had been placed under arrest by this time, indicated that he realized he was in trouble and asked Osterholme if he could contact an attorney (Tr. 54, 56; A. 13, 15). Osterholme

(Continued from preceding page)

"(2) Burglary in the second degree is a Class C felony."

ORS 164.225. "(1) A person commits the crime of burglary in the first degree if he violates ORS 164.215 and the building is a dwelling . . . .

"(2) Burglary in the first degree is a Class A felony."

testified that the question was asked under the following circumstances:

> "It was approximately—I would say a mile away from Washburn Way, possibly in that area when he made the statement, he said 'gee, I know I'm in a lot of trouble,' and then later he said 'do you think I could phone later,' or something like that to which I replied 'Yes, that we would make a phone available to him as soon as we got to the station.'
>
> * * * * *
>
> "Then he asked me 'do I have to show you where this bike is,' and I said 'no, we're not going to force you too [*sic*], however, we would like to get this cleared up tonight,' at which time he thought for a minute and then did go to where the bike was." (Tr. 62-63; A. 22).

Hass testified that what transpired was as follows:

> "Well, I just figured out that I was in a lot of trouble and I said that I wanted to see a lawyer and he said 'well, I can't let you do that,' and so then he says 'I'll let you when we get to the station' and then we went down—I don't know exactly the road but we went down this road and fished out the bike." (Tr. 66; A. 25-26).

Osterholme also indicated that after they had found the bicycle in question, Hass pointed out to him the homes from which the two bicycles had been taken (Tr. 59-60, 67-68; A. 18-19, 27).

After hearing testimony concerning these events *in camera*, the trial court ruled that the things Hass did and said prior to the time he inquired about the availability of counsel were admissible in the State's case-in-chief, but that Hass's inquiry constituted a request for

counsel and that anything he did or said thereafter was inadmissible (Tr. 70; A. 29). Accordingly, Osterholme testified in the State's case-in-chief only that Hass had admitted that he and Patrick Lee had taken two bicycles on the day in question because he had needed money, that he had given one bicycle back, and that the other bicycle was also subsequently recovered (Tr. 72-73; A. 31-32).

Hass then testified in his own behalf that he, Pat Lee, and Bill Walker had been driving around the area where the bicycles were taken, that Lee and Walker had taken the bicycles without his prior knowledge, that he did not know the exact location of the residences from which the bicycles had been taken, and that he knew only that the bicycles "came out of the area—you know, where I left Pat and Bill off" (Tr. 90-91, 95-96, 99, 109; A. 44, 48-50, 53, 63). In short, he admitted taking part in the subsequent concealment of the bicycles, and thus admitted his guilt of the crime of theft by receiving (Oregon Revised Statutes 164.095),[3] but claimed that he had had no part in the burglary with which he was charged.[4]

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[3] ORS 164.095. "(1) A person commits theft by receiving if he receives, conceals or disposes of property of another knowing or having good reason to know that the property was the subject of theft.

"(2) 'Receiving' means acquiring possession, control or title, or lending on the security of the property."

[4] Had the jury believed Hass's testimony and acquitted him of the burglary charge, it is doubtful that the State would have been able to reprosecute him for the theft of which he admitted his guilt, since the Oregon supreme court had adopted the "same-transaction" test for determining when jeopardy attaches several months before Hass's trial. *State v. Brown*, 262 Or. 442, 497 P.2d 1191 (1972). But *cf. State v. Ayers*, 98 Or. Adv. Sh. 1528, 16 Or. App. 177, 517 P.2d 1224 (1974).

In rebuttal, the State recalled officer Osterholme, who testified, over Hass's prior constitutional objections, that after he had obtained the admissions about which he had previously testified, he had taken Hass to the area where the two bicycles had been stolen, and that Hass had pointed out the houses from which they had been taken (Tr. 111-112; A. 64-65). The court then instructed the jury that this testimony was received only for purposes of impeachment (Tr. 124-126; A. 79-80). On surrebuttal, Hass denied that he had pointed out the residences in question (Tr. 126-127; A. 81).[1]

SUMMARY OF ARGUMENT

In this case, Hass testified on direct examination in a manner inconsistent with previous statements to the police which he had made after he had been properly advised of his constitutional rights and had inquired about the availability of counsel, but which were not claimed to have been coerced or involuntary in any other respect. On rebuttal, the prosecution presented evidence of those prior statements, and the trial court instructed the jury that they were received solely for their bearing on Hass's credibility.

[1] It may be noted in passing that the prosecutor did not lay a formal foundation for impeaching Hass by prior inconsistent statement, in that he did not inquire during his cross-examination of Hass whether, contrary to Hass's testimony that he did not know the exact location of the residences from which the bicycles were taken, he had not, in fact, pointed them out to officer Osterholme. However, defense counsel at no time objected to the proposed impeachment on this basis and thus failed to preserve any potential error. *Cf. Hill v. California*, 401 U.S. 797, 805-806 (1971) (admissibility of incriminating diary pages not raised in state court). Moreover, this procedural irregularity is clearly harmless in the context of this case, since Hass and his attorney not only knew at the time Hass took the stand, as a result of the earlier *in camera* hearing, that Osterholme was prepared to testify in a manner inconsistent with Hass's testimony, but also insisted on surrebuttal that Osterholme's testimony was false. And in any event, this irregularity is not one of constitutional dimensions.

The present case is thus identical in all material respects with *Harris v. New York*, 401 U.S. 222 (1971), which has been adopted and followed by the majority of the states since it was decided. The distinction which the Oregon supreme court drew herein between cases in which the defendant is advised of his rights improperly, or not at all, and cases in which the defendant attempts to invoke his rights does not require a different result in this case, because (1) in either situation, the effect of holding statements inconsistent with trial testimony inadmissible for impeachment purposes is to pervert the constitutional right to testify or not to testify into a constitutional right to commit perjury, and (2) the traditional standards of voluntariness and trustworthiness can be invoked to deter improper police conduct, when and if necessary.

ARGUMENT

In *Harris v. New York*, 401 U.S. 222 (1971), this Court held that statements of a criminal defendant which would be admissible in the prosecution's case-in-chief, but for the failure of the police to comply with the requirements of *Miranda v. Arizona*, 384 U.S. 436 (1966), may be used to impeach the testimony of a defendant who takes the stand and testifies in a manner contrary to his prior statements. The Court said that, notwithstanding certain broad language in the *Miranda* opinion:

> "It does not follow from Miranda that evidence inadmissible against an accused in the prosecution's case in chief is barred for all purposes, provided of

course that the trustworthiness of the evidence satisfies legal standards." 401 U.S. at 224.

As Mr. Justice Brennan noted in his dissenting opinion,[6] after *Miranda* was decided, only a minority of appellate courts, undeterred by the broad language therein which *Harris* declared to be dictum, held that statements inadmissible in the prosecution's case-in-chief might nevertheless be admissible for impeachment purposes.[7] Since *Harris* was decided, however, the majority of states in which similar questions have arisen have adopted its reasoning, with many of them overruling their prior contrary decisions in the process.[8] Two states have held, on grounds of state law, that *Harris* is not generally

[6] 401 U.S. at 231 n. 4.

[7] See *State v. Jackson*, 201 Kan. 795, 443 P.2d 279 (1968), cert. denied 394 U.S. 908 (1969); *State v. Kimbrough*, 109 N.J. Super. 57, 262 A.2d 232 (1970); *People v. Kulis*, 18 N.Y.2d 318, 274 N.Y.S.2d 873, 221 N.E.2d 541 (1966); *State v. Butler*, 19 Ohio St. 2d 55, 249 N.E.2d 818 (1969). *Cf. People v. La Batt*, 108 Ill. App. 2d 18, 246 N.E.2d 845 (1969), cert. denied 401 U.S. 963 (1971); *State v. Grant*, 77 Wash. 2d 47, 459 P.2d 639 (1969) (impeachment of witness: inadmissibility of statement in witness's prosecution assumed).

[8] See, *e.g.*, *State v. Johnson*, 109 Ariz. 70, 505 P.2d 241 (1973); *Rooks v. State*, 250 Ark. 571, 466 S.W.2d 478 (1971); *People v. Nudd*, — Cal. 3d —, 115 Cal. Rptr. 372, 524 P.2d 844 (1974); *Jorgenson v. People*, 174 Colo. 144, 482 P.2d 962 (1971); *Williams v. State*, 301 A.2d 88 (Del. 1973); *State v. Retherford*, 270 So. 2d 363 (Fla.), cert. denied 412 U.S. 953 (1973); *Campbell v. State*, 231 Ga. 69, 200 S.E.2d 690 (1973); *People v. Moore*, 54 Ill. 2d 33, 294 N.E. 2d 297, cert. denied 412 U.S. 943 (1973); *Davis v. State*, 257 Ind. 46, 271 N.E.2d 893 (1971); *Sabatini v. State*, 14 Md. App. 431, 287 A.2d 511 (1972); *Commonwealth v. Harris*, — Mass. —, 303 N.E.2d 115 (1973); *State v. Bryant*, 280 N.C. 551, 187 S.E.2d 111, cert. denied 409 U.S. 995 (1972); *State v. Kish*, 28 Utah 2d 430, 503 P.2d 1208 (1972) (implied: defendant did not testify after being told he could be impeached); *Riddell v. Rhay*, 78 Wash. 2d 248, 484 P.2d 907, cert. denied 404 U.S. 974 (1971); *Ameen v. State*, 51 Wis. 2d 175, 186 N.W.2d 206 (1971). *Cf. State v. Vega*, 163 Conn. 304, 306 A.2d 855 (1972) (statements made on pretrial motion to suppress evidence); *Crain v. Commonwealth*, 484 S.W.2d 839 (Ky. 1972) (letters written to prosecutor); *State v. Gervais*, 317 A.2d 796 (Me. 1974) (conviction of crime pending on appeal); *State v. Bea*,

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applicable in that state.[9] And two jurisdictions have refused to extend the applicability of *Harris* to readily distinguishable fact situations.[10]

In addition, two states have restricted—in our view erroneously—the holding of *Harris*, while acknowledging, however reluctantly, that it states the law applicable to its precise facts: Pennsylvania[11] and Oregon, in the present case.[12] We submit that the case at bar presents

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509 S.W.2d 474 (Mo. App. 1974) (statement suppressed for failure to disclose to defense); *State v. Iverson*, 187 N.W. 1 (N.D.), cert. denied 404 U.S. 956 (1971) (statements made at State's Attorney's Inquiry, without prior *Miranda* wrnings); *Trowbridge v. State*, 502 P.2d 495 (Okla. Cr. 1972) (physical evidence seized in warrantless search); *Kelley v. State*, — Tenn. Cr. —, 478 S.W.2d 73 (1972) (defendants' silence used to impeach exculpatory testimony).

[9] *State v. Santiago*, 53 Haw. 254, 492 P.2d 657, 662-665 (1971) (Hawaii Constitution prevents impeachment by statements inadmissible for substantive purposes); *State v. Butler*, 493 S.W.2d 190, 197-198 (Tex. Cr. 1973) (state statute requiring advice of rights prevents use of statements obtained in violation thereof for impeachment.

[10] *Alesi v. Craven*, 440 F.2d 795 (9th Cir.), cert. denied 404 U.S. 856 (1971) (statements made under actually coercive circumstances not admissible for impeachment); *People v. Bobo*, 390 Mich. 355, 212 N.W.2d 190 (1973) (fact that accused remained silent when confronted by police not admissible for impeachment).

[11] *Commonwealth v. Horner*, 453 Pa. 435, 309 A.2d 552, 555 (1973) (*Harris* inapplicable to testimony given at preliminary hearing). See also *Commonwealth v. Woods*, 455 Pa. 1, 312 A.2d 357, 358 (1973) (defendant's pretrial statements held not inconsistent with trial testimony).

[12] *Cf. State v. Florance*, 99 Or. Adv Sh 1997, 2007, — Or —, 527 P.2d — (1974), in which the Oregon supreme court followed the interpretation of the Fourth Amendment enunciated in *United States v. Robinson*, 414 U.S. 218 (1973), but stated, in the course of its opinion:

> "If we choose we can continue to apply this [earlier] interpretation [of the law of search and seizure]. We can do so by interpreting Article I, § 9, of the Oregon constitutional prohibition of unreasonable searches and seizures as being more restrictive than the Fourth Amendment of the federal constitution. *Or we can interpret the Fourth Amendment more restrictively than intrepreted by the United States Supreme Court.*" [emphasis added].

Cooper v. California, 386 U.S. 58, 62 (1967), impiles, if it does not hold, that the emphasized sentence is not correct.

a fact situation identical in all material respects to that which was before the Court in *Harris*, notwithstanding the attempt of the Oregon supreme court to distinguish the two.

In the first place, here, as in *Harris*, the testimony of the defendant which the prosecution sought to impeach was given on direct examination and in this case, was also given after the defense knew that testimony to the contrary had been ruled inadmissible in the prosecution's case-in-chief. Hence, the Court is not here dealing with the question, posed hypothetically by some critics of the *Harris* decision,[8] of whether *Harris* applies with equal force to cases in which the defendant does not initially present testimony contrary to his previous statements, but is simply exposed to cross-examination which brings out the inconsistency. This is not, then, a case of a criminal defendant whose decision whether or not to take the stand is improperly influenced by the fear of being impeached as to matters beyond the scope of his direct examination. It is a case of a criminal defendant attempting to use "[t]he shield provided by Miranda" as "a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances." *Harris v. New York*, 401 U.S. at 226. We submit that the constitutional right to testify or not testify in one's own behalf is not thus to be converted into a constitutional right to lie. See *United States v. Kahan*, 415 U.S. 239, 245 (1974).

[8] See, *e.g.*, Note, 32 La. L. Rev. 650, 655 (1972).

Secondly, here, as in *Harris*, the defendant made no claim that his statements to the police were, in fact, coerced or involuntary. To the contrary, it is undisputed that Hass readily admitted his involvement in the crime under investigation after being fully advised of his *Miranda* rights. Hass claims only that his later inquiry about the availability of counsel rendered inadmissible anything he did or said thereafter. He acknowledges that he was told that he could contact an attorney when he reached the police station,[9] and he does not claim that he was thereafter compelled to continue to assist in the police investigation.

Hence, the statements challenged in this case were obtained under circumstances which satisfy pre-*Miranda* standards of voluntariness and trustworthiness. The mere fact that an accused inquires about the availability of counsel does not automatically render his subsequent statements inadmissible under those standards. *Frazier v. Cupp*, 394 U.S. 731, 737-739 (1969).

Thirdly, here, as in *Harris*, the jury was carefully instructed that the evidence concerning the challenged statements was to be considered only for its bearing on the credibility of the defendant as a witness, and not as proof of his guilt. The jury may be presumed to have understood and followed that instruction. See *Harris v. New York*, 401 U.S. at 223. *Cf. Frazier v. Cupp*, 394

[9] Indeed, it is not clear that advice of constitutional rights which tells the accused that counsel will be made available at a later time (*e.g.*, "when and if you go to court") renders statements subsequently given inadmissible in the prosecution's case-in-chief. See the cases collected in Mr. Justice Douglas's dissent from the denial of certiorari in *Wright v. North Carolina*, 415 U.S. 936 (1974).

U.S. 731, 735-736 (1969) (instruction that statements of counsel are not substantive evidence). But *cf. Bruton v. United States*, 391 U.S. 123, 127-130 (1968) (instruction to disregard substantive evidence with respect to one of two jointly-tried defendants).

In the present case, the Oregon supreme court distinguished between cases like *Harris*, in which the defendant is not properly advised of his right to counsel, and those like the one at bar, in which he is properly advised but is not immediately given an attorney when he inquires about the availability of counsel. See 267 Or. at 492-493, 517 P.2d at 673, Petition for Certiorari at 15-16). This distinction should not be held to require a different result in this case.

As the Court noted in *Harris*, the possibility that impermissible police conduct will be encouraged by permitting the use, for impeachment purposes, of statements which are inadmissible in the prosecution's case-in-chief is, at best, speculative. 401 U.S. at 225. The alleged misconduct which occurred in this case, for example, is, at most, only a minor deviation from the requirements of *Miranda*, with which the police were clearly trying to comply. Total suppression, even for impeachment purposes, of statements obtained under such circumstances is not necessary as a prophylactic measure. The traditional standards of voluntariness and trustworthiness remain viable and can be invoked to prevent all use of statements obtained under circumstances involving actual coercion or untrustworthiness, when and if such exclusion is necessary; and they are sufficient for this

purpose. See, *e.g.*, *Alesi v. Craven*, 440 F.2d 975 (9th Cir.), cert. denied 404 U.S. 856 (1971).

It is perhaps for the foregoing reasons that other cases similar to the one at bar have uniformly not recognized the distinction made by the Oregon supreme court in this case, and have held *Harris* applicable, regardless of whether the accused is improperly advised of his rights or whether, after being properly advised, he declines to waive them. See *United States ex rel. Wright v. La Vallee*, 471 F.2d 123, 125 (2d Cir 1972), cert. denied 414 U.S. 867 (1973) (decided under *Escobedo*[8] standards: that defendant requested and was denied counsel assumed); *State v. Bryant*, 280 N.C. 551, 187 S.E.2d 111, 113, cert. denied 409 U.S. 995 (1972) defendant apparently warned, but did not waive counsel). *Cf. People v. Nudd*, — Cal. 3d —, 115 Cal. Rptr. 372, 524 P.2d 844 (1974) (defendant questioned "off the record" after refusing to make statement); *Colbert v. State*, 124 Ga. App. 283, 183 S.E.2d 476, 478-479 (1971) (defendant claimed to have requested counsel: reversed because court did not limit statements solely to impeachment); *People v. Hooks*, 14 Ill. App. 3d 89, 302 N.E.2d 241, 243 (1973) (that defendant was told he would not be given counsel until court appearance assumed);[9] *Davis v. State*, 257 Ind. 46, 271 N.E.2d 893, 895 (1971) (defendant willing to talk, but also wanted to contact attorney: court's striking of impeachment testimony characterized as erroneous).

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[8] *Escobedo v. Illinois*, 378 U.S. 478 (1964).

[9] See Note 14, *supra*.

CONCLUSION

For the above reasons, the judgment of the Supreme Court of the State of Oregon should be reversed and this cause remanded for the proceedings necessary for the Oregon courts to cause the judgment of the trial court to be affirmed.

Respectfully submitted,

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